U.S. Department of Justice

Environment and Natural Resources Division

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BSG:AML
DJ No. 90-11-3-1620/2

October 2, 2002

VIA EMAIL, TELECOPY, AND REGULAR MAIL
CONFIDENTIAL SETTLEMENT COMMUNICATION

Gary Franke, Esq.
120 E. Fourth St.
Suite 560
Cincinnati, OH 45202

Re: United States v. Aeronca, Inc. et al.
Civil Action No. 1:01 CV 00439
Response to October 1, 2002 Offer

Dear Gary:

This letter responds to your letter of October 1, 2002, in which you set forth a new offer on behalf of your clients, Clarke Services, Inc., Richard M. Clarke, and Clarke, Inc. (the "Dick Clarke Entities"). I recognize the difficulty that Mr. Clarke has in trying to understand the liability scheme under CERCLA, and thus I know that he believes that his latest offer is very generous. Unfortunately, there simply is no way that the United States can settle this case for anything in the five figure range.

Fairness Issues

Setting aside all liability questions, the United States has a fundamental duty to be fair to others who have settled or may settle with us. The $70,000 offer that the Dick Clarke Entities have made is the same amount that a small company known as Acme Wrecking settled with us for last October. The limited evidence that we had with respect to Acme Wrecking demonstrated that Acme Wrecking sent, as most, construction debris; Acme Wrecking sent less waste than the Dick Clarke Entities (no one at Skinner had any recollection of Acme Wrecking at the Site); Acme Wrecking had no tie to any cyanide waste; and Acme Wrecking had a limited ability to pay. How, in good conscience, could the United States now settle with the Dick Clarke Entities – where we have much stronger evidence and NO ability to pay issues – for the same amount that we settled with Acme Wrecking for? We cannot do it.

In addition, King Wrecking settled this case by becoming a member of the Skinner Landfill Work Group, taking on the responsibilities for the Work and agreeing to pay its ADR allocated contribution to the Work Group. Again, our evidence with respect to King Wrecking showed only construction debris. While the evidence demonstrates that King Wrecking sent

much, much more debris than the Dick Clarke Entities, nevertheless, King Wrecking agreed early on to accept its Superfund liability and agreed to pay vastly more than the $70,000 current offer of the Dick Clarke Entities.

Finally, the Martin Clarke Entities have made an offer that goes a lot farther toward recognizing their fair share of liability at this Site -- and the risks of joint and several liability -- than the current offer of the Dick Clarke Entities. While the United States has not reached a settlement agreement yet with the Martin Clarke Entities, the United States is extraordinarily cognizant of fairness issues because we are dealing with two brothers. Indeed, unlike Mr. Richard Clarke, the United States does not even have a claim of personal liability against Mr. Martin Clarke.

Phase I

Martin Clarke, unlike Richard Clarke, actually was at the Site in the early 1960s. In addition, Tom Clarke, Jr. was there for some six months in 1963 when his father was ill. Both testified to the presence of a dump truck. Indeed, in your letter, you state that Thomas Clarke, Sr. had a dump truck in the early 1960s. With the exception of one small, 1956 entry, the Skinner Log entries that are the basis for the liability in this phase all occurred in 1963 – a time when Thomas Clarke, Sr. clearly had a dump truck. So, your implied argument that Thomas Clarke could not have used the Skinner Site during this early phase because Thomas Clarke did not have a dump truck is contradicted by the clear evidence that demonstrates that the disposals at issue occurred in 1963.

Moreover, there is evidence in this case to the effect that everyone who had a pick-up truck disposed of waste at Skinners as a result of cleaning up the waste from the fire at the Sharonville army depot. While testimony has not yet been developed to demonstrate that that fire was the source of Thomas Clarke's disposal at the Skinner Site, it is a possibility.

Nevertheless, in an effort to achieve settlement, the United States will reduce its demand here by 50%, and seek $14,975.

Phase II

Your argument that it was Ford that directed its drivers to the Skinner Site was interesting to me on the telephone on September 13, 2002. Now, however, I have reviewed the transcripts and documents, and I do not know what evidence you base your argument on.

Ralph Dent explicitly said that his memo was an exact reflection of what Mr. Oliver told him. In that memo, Dent says:

> Mr. Oliver states that on May 12, 1964, driving truck #0-105, he took about 5 - 200# drums of so called cyanide waste from Sharonville salvage department to the

> Clarke Sanitary fill on Kemper Road. Upon arriving at the Clarke dump, Mr. Oliver was told that he was to take the load to the Skinner dump in West Chester to be buried.

The clear and unmistakable inference is that someone at the Clarke dump told Oliver to go to Skinner's. Why would Oliver even have stopped at the Clarke dump if Ford had directed him to go to Skinner's? Moreover, Ford had a purchase order with Clarke -- not Skinner. Third, Thomas Clarke's affidavit said that he "received" the cyanide chemicals, and after that, shipped them to Skinner's. Other Ford documents indicate that Ford was mystified about how the May 1964 cyanide drums got to Skinners. If Ford had directed the cyanide drums to go to Skinner's -- despite its purchase order with Clarke -- Ford would not have needed to investigate how these drums got to Skinner's.

Moreover, your cross examination of Mr. Dent had nothing to do with the 5 drums of cyanide waste; it involved only the 4 additional drums that Clarke put on the truck:

> Mr. Franke: During your employment with Ford, was Ford in the habit of hauling – Ford employees in Ford trucks, were they in the habit of hauling *other people's trash*?
>
> Mr. Dent: No.
>
> Mr. Franke: When Ford employees were hauling trash, did they need approval to haul?
>
> Mr. Dent: They most certainly did.
>
> Mr. Franke: All right. One other question: Were Ford employees union back then?
>
> Mr. Dent: Oh, yes, yes.

Nothing in this colloquy suggests that Ford employees did not haul Ford's *own* trash, and nothing contradicts the documentary evidence described above. Thus, despite your interesting argument that "Ford directed its drivers as to where to dump waste materials," the facts of this case demonstrate that Ford directed Oliver to go to the Clarke dump and after getting there, someone at Clarke told Oliver to go to Skinners.

So, having reviewed the evidence, the United States is confident that the Court will find that Clarke's Sanitary Fill – with Clarke employee Bill Welks on the truck – directed Oliver to go to Skinners; Ford did not do so.

Nevertheless, given some litigation risk that you have exposed with respect to the United States' case, we can agree to compromise part of this claim. Our earlier demand of $182,976 was based upon an assumption of 10 drums per year for 6 years, totalling 60 drums. We can

compromise down to 5 drums per year for 6 years, totalling 30 drums, or 1650 gallons. Giving Clarke Services 75% of this allocation, Clarke Services gets 1237 gallons. At $73.93, that amounts to $91,450.

Phase III

Your letter states that "based on actual evidence, Dick Clarke entities delivered 3,540 cubic yards to the site in the late 80s." The documentary evidence for 1988 and 1989 – which I summarized in the table that I attached to my September 12, 2002 letter -- unambiguously shows 3780 cubic yards. I do not understand where the Dick Clarke Entities came up with 3,540 cubic yards. If you want to show me where I am wrong, please do so, but I used the invoices and the canceled checks. On four occasions, there were canceled checks and no corresponding invoices (July 1989, September 1989, November 1989, and December 1989). A canceled check payable to the Skinner Landfill, however, clearly is documentary evidence demonstrating disposal. (Obviously, there also is a myriad of testimony about Dick Clarke being at the Site.) Because, by 1989, the cost was a flat $2.00 per cubic yard, it is clear how many cubic yards the payments represent. Please see my table.

In addition, there is documentary evidence in the Skinner Log for a $50 payment in 1985. That is where I got the additional 50 cubic yards for total documented cubic yards of 3,830. Again, if you want to explain to me how I am wrong about the documentary evidence that I am basing the disposal on, please do so. But I can assure you that I have looked at this evidence very carefully. The documents show 3,830 cubic yards of disposal.

Moreover, it is difficult for the United States to ignore the voluminous testimony that supports the view that Dick Clarke disposed of much more than 3,830 cubic yards in the 1980s. Other PRPs who settled had their volumetric contributions increased well beyond the documentary evidence. In this case, however, the United States will settle for a 25% increase (as opposed to a 50% increase), making this 4787 cubic yards, which equates to $133,365.

Offer

I am willing to recommend to appropriate authorities in EPA and DOJ a settlement in this case for $239,790. Any settlement must be embodied in a Consent Decree that includes terms and conditions of the sort that the United States filed earlier in this action when we settled with Acme Wrecking, Sealy, and Hirschberg. Such Consent Decree provisions are standard.

Other Matters

Large Compromise of the United States. The offer of $239,790 is $377,000 less than what was demanded based on the allocator's report ($616,804). The offer is $448,500 less than what the United States demanded prior to the litigation ($688,304). These are substantial

changes from the past, and demonstrate that the United States has reviewed the evidence and tried to be fair. However, we cannot go indefinitely downward.

Adjustment for Cost of Litigation. Perhaps the most perplexing part of the offer of the Dick Clarke Entities is an approximately 30% decrease in its own admitted volumetric share based in part on "the expenses [the] client has incurred to date." Caselaw is crystal clear that the expenses that the *United States incurs* in pursuing cost recovery are part of the "costs" that the United States is entitled to recover if we prevail under a theory of joint and several liability. This law is designed to encourage settlement because most PRPs find it difficult to swallow paying for the United States' litigation expenses. Thus, when the Dick Clarke Entities suggest that the United States should provide them with a discount, our response is that ALL of the law demonstrates that your clients will be paying our costs if they are held liable. There can be no "discount" or "downward adjustment" for your clients' costs and expenses.

Successor Liability. Despite your clients' "vehement opposition" to making any payments for Phase I and Phase II, they are going to have to recognize their liability risk here. A "we will not pay anything for this" is not going to work.

Joint and Several Liability. Once again, the offer of the Dick Clarke Entities does not reveal any acknowledgment of the risk of joint and several liability that they face. Page 4, Paragraph (6) of my letter of September 16, 2002, reiterated the point that I have made numerous times.

Additional Liability Evidence. In his deposition, Mr. Richard Clarke was adamant that Clarke Services never sent material to Skinners (that is, that there was no disposal at the Skinners in the 1970 to 1984 timeframe). The only testimony to the contrary that has yet been found is Mr. Tumulty's. I am aware that Mr. Clarke believes that Tumulty has a motive to lie, even though Tumulty testified to only one truckload (and it would seem odd to lie about one truckload). An investigator recently has talked to another former truck driver who states that he delivered numerous loads to Skinner's during the timeframe set forth above. The individual did not identify any chemical waste disposal, but rather, stated that he disposed of commercial and factory waste. I am not now going to reveal the individual's name because I have not yet spoken to him personally, but obviously, if this case goes on, I will speak to him, and will provide the name to you. However, this is another fact for you and the Dick Clarke Entities to consider.

Timing. The United States has said since August 23, 2002, that we cannot accept a five figure settlement. We also have said that there is a "limited" window for settlement in September. Nevertheless, the Dick Clarke Entities – five weeks after August 23, 2002 -- still are at a five figure settlement. The time for decision has come. Please provide me a counteroffer by

letter telecopied to me by no later than COB on Monday, October 7, 2002. If you do not do so, I will have no choice but to close off settlement negotiations and move to the expert witness phase.

Your prompt attention to these matters is appreciated.

Sincerely,

Annette M. Lang
Trial Attorney

cc: Mike O'Callaghan